

## CRIMINAL CODE REPORTER

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### 12-864 Direct or constructive contempts.

.020 A contempt sanction is considered civil if it either coerces the defendant into compliance with the court's order, or compensates the complainant for losses sustained.

*Stoddard v. Donahoe*, 224 Ariz. 152, 228 P.3d 144, ¶¶ 12-17 (Ct. App. 2010) (because sanction was that trial court ordered deputy to apologize publicly for looking at papers in file on table for defense counsel and remain in jail until he did apologize, contempt was civil).

### 13-105(22)(c) Definitions. (Historical prior felony conviction—Class 4, 5, or 6 felony.)

.020 In determining whether a class 4, 5, or 6 felony was committed within the 5 years immediately preceding that date of the present offense, time spent incarcerated is excluded, which includes presentence incarceration.

*State v. Rodriguez*, \_\_\_ Ariz. \_\_\_, \_\_\_ P.3d \_\_\_, ¶¶ 5-12 (Ct. App. 2010) (defendant contended he received ineffective assistance of counsel because his attorney did not argue his prior conviction did not qualify as historical prior felony conviction; state contended it was historical prior felony conviction when time spent incarcerated was excluded; court rejected defendant's contention time he spent in presentence incarceration should not be counted as excluded time).

### 13-116 Double punishment.

.070 In order to impose consecutive sentences for two crimes, the transaction must satisfy two tests: **First**, whether, after subtracting the facts necessary to support the primary charge, there are sufficient facts to support the secondary charge.

*State v. Mason*, 225 Ariz. 323, 238 P.3d 134, ¶¶ 10-13 (Ct. App. 2010) (defendant was charged as accomplice with aggravated assault and armed robbery as result of his two accomplices beating victim, one with police baton and one with baseball bat; defendant contended consecutive sentences were not permissible because accomplices committed aggravated assault using baton and bat, and committed armed robbery using baton and bat; court held there was one beating during assault, and separate show of force during robbery, thus consecutive sentences were permissible).

.080 In order to impose consecutive sentences for two crimes, the transaction must satisfy two tests: **Second**, either (1) the defendant could have committed the primary crime without committing the secondary crime, or (2) if the defendant could not have committed the primary crime without committing the secondary crime, the defendant's commission of the secondary crime exposed the victim to more potential harm than necessary in committing the primary crime.

*State v. Mason*, 225 Ariz. 323, 238 P.3d 134, ¶¶ 10-13 (Ct. App. 2010) (defendant was charged as accomplice with aggravated assault and armed robbery as result of his two accomplices beating victim, one with police baton and one with baseball bat; defendant contended consecutive sentences were not permissible because accomplices committed aggravated assault using baton and bat, and committed armed robbery using baton and bat; court held defendant could have committed aggravated assault without committing armed robbery, and additionally, risk of harm to victim was increased by accomplices' possession of weapons during armed robbery, thus consecutive sentences were permissible).

### 13-205 Affirmative defenses; burden of proof.

.030 Senate Bill 1449, which sought to nullify the holding of *Garcia v. Browning* and make the previous amendment to § 13-205(A) “retroactively applicable to all cases in which the defendant did not plead guilty or no contest and that were pending . . . on April 24, 2006,” is not unconstitutional as a violation of the separation of powers.

*State v. Montes*, \_\_\_ Ariz. \_\_\_, 245 P.3d 879, ¶¶ 8-19 (2011) (defendant committed his offenses September 11, 2005; because defendant committed his offenses prior to April 24, 2006, and his trial began after that date, trial court required defendant to prove that he acted in self-defense; defendant was convicted and appealed; court affirmed conviction on September 18, 2009, and defendant filed motion for reconsideration, which was pending on September 30, 2009, effective date of Senate Bill 1449; defendant contended Senate Bill 1449 was change in law that entitled him to new trial; court held Senate Bill 1449 was not unconstitutional and thus entitled defendant to new trial).

*State v. Rios*, 225 Ariz. 292, 237 P.3d 1052, ¶¶ 1-51 (Ct. App. 2010) (state charged defendant in November 2005 with first degree murder, aggravated assault, discharge of firearm at structure, and assisting criminal street gang; evidence showed victim pulled their truck in front of defendant’s house and had verbal altercation with defendant’s friends and relatives; defendant stated he heard them threaten his brother, so he retrieved and loaded his AK-47 and fired several rounds at truck, killing one and injuring other; defendant testified he fired at victims only because he feared they would use deadly force against him and his family; defendant requested trial court instruct jurors that state had burden of disproving justification; trial court denied request and instructed jurors defendant had burden of proving justification; case was submitted to jurors 6/25/06; court disagreed with *State v. Montes*, 223 Ariz. 337, 223 P.3d 681 (Ct. App. 2009), for which it noted review was pending, reversed conviction, and remanded for new trial).

.040 A trial court must give a self-defense instruction if there is some evidence indicating a reasonable person in the defendant’s circumstance would have believed physical force was immediately necessary to protect himself or herself, and there is no requirement that the person acted solely out of that belief.

*State v. King*, 225 Ariz. 87, 235 P.3d 240, ¶¶ 5-18 (2010) (evidence presented was that victim had thrown and hit defendant on head with full, 2-liter bottle of water, and that defendant then struck victim several times and kicked him in side; victim died from internal bleeding caused by blunt-impact laceration of spleen; court disapproved previous cases that held self-defense was available if person acted solely in belief of in immediate physical danger; court held defendant was entitled to self-defense instruction).

### 13-404 Justification; self-defense.

.010 A trial court must give a self-defense instruction if there is some evidence indicating a reasonable person in the defendant’s circumstance would have believed physical force was immediately necessary to protect himself or herself, and there is no requirement that the person acted solely out of that belief.

*State v. King*, 225 Ariz. 87, 235 P.3d 240, ¶¶ 5-18 (2010) (evidence presented was that victim had thrown and hit defendant on head with full, 2-liter bottle of water, and that defendant then struck victim several times and kicked him in side; victim died from internal bleeding caused by blunt-impact laceration of spleen; court disapproved previous cases that held self-defense was available if person acted solely in belief of in immediate physical danger; court held defendant was entitled to self-defense instruction).

**13-701(D)(18) Aggravating circumstances—Offense committed in presence of child.**

**.010** It is an aggravating circumstance if the defendant committed the offense in the presence of a child and any of the circumstances exist that are set forth in A.R.S. § 13-3601(A).

*State v. Burgett*, 226 Ariz. 85, 244 P.3d 89, ¶¶ 2-5 (Ct. App. 2010) (defendant (mother) and victim (father) had two children, but were now living apart; defendant was involved with another man, but she and he had fight and she had gone to victim's home seeking place to stay; during night, defendant left her room and went to victim's bedroom, and attacked him with box cutter; defendant contended she did not commit offense in children's presence because neither child saw actual attack; court held that, because victim's daughter saw defendant leave room with box cutter, heard victim's screams, and saw aftermath of defendant's assault when bleeding victim immediately ran from his bedroom into living room, defendant committed assault in children's presence even though they were not in victim's bedroom when attack occurred).

**13-701(D)(24) Sentence of imprisonment—Aggravating factors—Any other factor.**

**.010** In determining the sentence, the trial court may consider any other factor the state alleges is relevant to the defendant's character or background or to the nature or circumstances of the crime, but the trial court may not increase a defendant's maximum potential sentence based solely on this "catch all" aggravating factor.

*State v. Ponsart*, 224 Ariz. 518, 233 P.3d 631, ¶¶ 13-16 (Ct. App. 2010) (because trial court found defendant had caused physical and emotional harm to victim, which is specific aggravating circumstance under (D)(9), and because evidence supported this aggravating circumstance, trial court did not err in considering other factors under "catch all" aggravating circumstance).

**13-705 Dangerous crimes against children.**

**.010** Because the provisions of this section apply to "a person who is at least 18 years of age or who has been tried as an adult," it does not apply to a juvenile.

*In re Casey G.*, 223 Ariz. 519, 224 P.3d 1016, ¶¶ 3-5 (Ct. App. 2010) (because Casey was younger than 18 years of age and was not tried as adult, allegation of dangerous crime against children did not apply to him; court rejected state's contention that classifying present offense as dangerous crime against children would allow this offense to serve as predicate felony in event Casey subsequently committed eligible offense after his 18<sup>th</sup> birthday, noting present offense was juvenile adjudication, and therefore could not be considered criminal conviction for enhancement purposes).

**13-751(A) Sentence of death or life imprisonment—Natural life.**

**.010** A natural life sentence for a person who was a juvenile at the time of the crime does not violate the Eighth Amendment.

*State v. Pierce*, 223 Ariz. 570, 225 P.3d 1146, ¶¶ 2-13 (Ct. App. 2010) (defendant was 16 when he and three others committed crime; female rang doorbell of victim's house; when victim opened door, female stepped aside and defendant and two other males rushed into house; victim struggled with male who had shotgun, and later died of gunshot wounds; defendant said plan was to take guns, money, and "weed" from victim's house; he said he was to get into house "to go grab the s\*\*t" and "to do what I needed to do," which included shooting someone if necessary "[for] my safety"; defendant said that "the dude f\*\*\*\*\*d up" by grabbing the shotgun; court noted United States Supreme Court has only held death sentence for juveniles was cruel and unusual punishment and intimated that natural life sentence for juvenile who committed murder was permissible).

### 13-805(A) Jurisdiction—Manner of payment and restitution orders.

.020 The language, “At the time the defendant completes his period of probation” is advisory and not jurisdictional, thus a trial court may enter a criminal restitution order within a reasonable time after the defendant completes the period of probation; in determining what is a reasonable time, the trial court should consider such factors as (1) length of delay, (2) reason for the delay, (3) who was responsible for the delay, (4) the effect of the delay, (5) any prejudice the defendant has suffered as a result of the delay, and (6) whether any prejudice can be cured or mitigated.

*State v. Unkefer*, 225 Ariz. 430, 239 P.3d 749, ¶¶ 7–24 (Ct. App. 2010) (defendant pled guilty to fraudulent schemes and artifices under plea agreement that capped restitution at \$7.5 million and entitled him to offset for funds collected to date and in future; on 11/18/88, trial court sentenced defendant to 10 years in prison, and on 6/20/89, ordered him to pay \$7.5 million in restitution; defendant was released from prison 5/15/1996; on 11/18/08 (12½ years after released from prison and 20 years after imposition of sentence), trial court entered criminal restitution order that defendant pay \$7,498,530 in restitution; court rejected defendant’s claim that 12½ year delay by itself violated standard of reasonableness, but remanded for trial court to consider whether 12½ year delay was reasonable under above factors).

### 13-901(E) Probation—Early termination of probation.

.010 The court may terminate the period of probation or intensive probation and discharge the defendant at a time earlier than originally imposed if, in the court’s opinion, the ends of justice will be served and if the conduct of the defendant on probation warrants it.

*State v. Lewis*, 226 Ariz. 124, 244 P.3d 561, ¶¶ 8–17 (2011) (on 9/15/03, defendant was placed on probation for 5 years; on 9/03/08, defendant’s probation officer filed petition to terminate defendant’s probation; although defendant was delinquent 245 hours of community service, had paid only \$4,200 toward the \$6,600 in fines and fees, and had violated probation three times, because defendant had completed 180 days in inpatient drug rehabilitation program and had remained drug-free, had completed 347 hours of community service, had married and had two children, attended church regularly, completed vocational training, and had maintained steady employment with same company for 2 years, trial court did not abuse discretion in terminating defendant’s probation and designating it as “unsuccessful” termination).

*State v. Dean*, 226 Ariz. 47, 243 P.3d 1029, ¶¶ 15–17 (Ct. App. 2010) (probation officer filed motion to terminate defendant’s probation based on *State v. Peek*, which held person convicted of attempted child molestation could not receive lifetime probation; because trial court modified defendant’s probation under Rule 27.3 rather than terminating it under Rule 27.4, trial court did not have to make determination whether ends of justice would be served).

.010 Because this statute provides the court may terminate probation if the ends of justice will be served and the defendant’s conduct on probation warrants it, the only way the trial court may terminate probation is if the defendant’s conduct indicates the defendant has been rehabilitated.

*State v. Lewis*, 226 Ariz. 124, 244 P.3d 561, ¶¶ 8–17 (2011) (defendant’s successful completion of drug-treatment program, abstention from drugs and alcohol, performance of community service hours, payment of part of fines and fees owed, changes in lifestyle, acceptance of responsibility for his delinquencies, and letters of community support was sufficient to show defendant had been rehabilitated).

**13-903(A) Calculation of periods of probation—Commencement of period of probation.**

.010 This section provides, “A period of probation commences on the day it is imposed or as designated by the court”; because this section is written in the disjunctive, it allows the trial court to begin a probation term either on the date the defendant is sentenced or on another day designated by the trial court, thus the trial court may impose consecutive terms of probation, and may do so whether the offenses are charged in same or different charging documents.

*State v. Bowsher*, 225 Ariz. 586, 242 P.3d 1055, ¶¶ 7–20 (2010) (defendant was charged with 10 felonies under two indictments; defendant pled guilty to one count in each indictment; trial court placed defendant on probation for 4 years for each offense to be served consecutively; court held trial court had authority to do so, and may do so whether the offenses are charged in same or different charging documents).

**13-1105 First-degree murder—Felony murder.**

.110 Although the felony of aggravated assault will not support a charge of felony murder, any of the other listed predicate felonies will, and they do not merge into the murder.

*State v. Kuhs*, 223 Ariz. 376, 224 P.3d 192, ¶¶ 22–25 & n.4 (2010) (defendant was convicted of felony murder with burglary as underlying felony, based on theory that defendant entered apartment with intent to assault victim; defendant claimed entry was with intent to commit murder so burglary could not be underlying felony; court held evidence was sufficient to show defendant entered apartment with intent to commit aggravated assault, and even if entry was with intent to commit murder, that still would support burglary as underlying felony).

**13-1204(A)(6) Aggravated assault—Person 18 years of age or older and child 15 years of age or younger.**

.010 This section applies to a person 18 years of age or older who commits an assault on a child 15 years of age or younger, which includes a child who has passed the 15<sup>th</sup> birthday and has not yet reached the 16<sup>th</sup> birthday.

*State v. Munoz*, 224 Ariz. 146, 228 P.3d 138, ¶¶ 3, 6, 9–18 (Ct. App. 2010) (defendant was over 18 years of age and victim was 3 months beyond her 15<sup>th</sup> birthday; court rejected defendant’s contention that person is 15 years of age only on day of 15<sup>th</sup> birthday).

**13-1501(4) Definitions (criminal trespass and burglary)—Fenced commercial yard.**

.010 The definition of “fenced commercial yard” provides that it “is used primarily for business operations”; the use of the present tense means the business must be currently in operation or in the process of winding down.

*State v. Hinden*, 224 Ariz. 508, 233 P.3d 621, ¶¶ 7–13 (Ct. App. 2010) (defendant was in fenced yard gathering scrap metal; because evidence showed there had been no business in operation on property for 18 years and that no one had been seen working on property for 4 years, property was not considered “fenced commercial yard” and thus state failed to prove elements of offense).

.020 The definition of “fenced commercial yard” provides that it is “where livestock, produce or other commercial items are located”; “commercial items” are those used in a current business operation.

*State v. Hinden*, 224 Ariz. 508, 233 P.3d 621, ¶ 14 (Ct. App. 2010) (defendant was in fenced yard gathering scrap metal; because there was no showing owners were going to use items for construction or any commercial activity, and instead it appeared owners thought items were of no value, evidence did not support required element of “fenced commercial yard” and thus state failed to prove elements of offense).

**13–1506(A)(1) Burglary in the third degree—Nonresidential structure or fenced commercial or residential yard.**

.020 The definition of “fenced commercial yard” provides that it “is used primarily for business operations”; the use of the present tense means the business must be currently in operation or in the process of winding down.

*State v. Hinden*, 224 Ariz. 508, 233 P.3d 621, ¶¶ 7–13 (Ct. App. 2010) (defendant was in fenced yard gathering scrap metal; because evidence showed there had been no business in operation on property for 18 years and that no one had been seen working on property for 4 years, property was not considered “fenced commercial yard” and thus state failed to prove elements of offense).

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*State v. Hinden*, 224 Ariz. 508, 233 P.3d 621, ¶ 14 (Ct. App. 2010) (defendant was in fenced yard gathering scrap metal; because there was no showing owners were going to use items for construction or any commercial activity, and instead it appeared owners thought items were of no value, evidence did not support required element of “fenced commercial yard” and thus state failed to prove elements of offense).

**13–1709 Emergency response and investigation costs; civil liability.**

.010 The trial court in a criminal proceeding has the authority to determine the amount of the defendant’s liability for expenses incurred incident to the emergency response and the investigation of the commission of the offense.

*State v. Ray*, 226 Ariz. 54, 243 P.3d 1036, ¶¶ 6–11 (Ct. App. 2010) (court rejected defendant’s contention that determination of liability could only be done in civil proceeding).

**13–2316(A)(7) Computer fraud—Information required to be kept confidential and records not public records.**

.010 Prohibition from disclosing “records that are not public records” refers to those records that do not fall within the public records law, not merely to records that might be exempt from disclosure under the public records law.

*State v. Young*, 223 Ariz. 447, 224 P.3d 944, ¶¶ 24–27 (Ct. App. 2010) (defendant was employed by ADOT as member of server management team and had access to all computer servers on ADOT computer network; defendant accessed performance scores of all employees in ADOT IT department but did not have authority to do so; court concluded records in question were public record but exempt from disclosure; because records defendant obtained were subject to public records law, statute did not prohibit accessing them, and fact that they were exempt from disclosure for policy reasons did not make them fall under this statute, thus evidence was insufficient to convict under this statute).

**13-3101(A)(6)(b) Definitions—Prohibited possessor—Prior conviction.**

.010 This section defines “prohibited possessor” as one who has been convicted of a felony, thus the state is required to prove the defendant was previously convicted of a felony.

*State v. Kinney*, 225 Ariz. 550, 241 P.3d 914, ¶¶ 23–26 (Ct. App. 2010) (defendant was convicted of possession of deadly weapon by prohibited possessor; to prove defendant’s prior conviction, state presented document from federal court showing person with defendant’s name and date of birth had been convicted of armed bank robbery; court held this was sufficient).

**13-3419(A) Multiple drug offenses not committed on the same occasion; sentencing—Presumptive ranges.**

.020 Because this section provides that a person convicted for multiple drug offenses committed on different occasions will be sentenced under this section, if a charging document contains counts alleging multiple drug offenses committed on different occasions, the defendant will thereby be on notice that the trial court will sentence under this section, thus there is no requirement that the state file any separate allegation.

*State v. Francis*, 224 Ariz. 369, 231 P.3d 373, ¶¶ 9–15 (Ct. App. 2010) (state obtained indictment charging 13 counts, some committed in 2006 and some committed in 2007; because indictment alleged all facts necessary for sentencing under A.R.S. § 13-3419 and state did not have to prove any facts other than those in indictment, state did not have to file separate document alleging enhancement under A.R.S. § 13-3419).

**13-3553(A)(1) Sexual exploitation of a minor—Creation of visual image.**

.010 Subsection (A)(1) prohibits recording, filming, photographing, developing, or duplicating, while subsection(A)(2) prohibits distributing, transporting, exhibiting, receiving, selling, purchasing, electronically transmitting, possessing, or exchanging; because section (A)(1) is directed at the creation of the visual image, while section (A)(2) is directed at acts that can happen only after the visual image is created, these two sections address two separate harms and thus are two separate offenses.

*State v. Windsor*, 224 Ariz. 103, 227 P.3d 864, ¶¶ 5–8 (Ct. App. 2010) (while in public library, defendant used library computer to access pornographic pictures of children on Internet; he then downloaded them and saved them in shared file on computer’s hard drive; state charged defendant under section (A)(1); court concluded defendant’s actions constituted “duplicating” images, thus evidence supported defendant’s conviction).

*State v. Windsor*, 224 Ariz. 103, 227 P.3d 864, ¶¶ 9, 14 (Ct. App. 2010) (defendant accessed pornographic pictures of children on Internet, downloaded them, and saved them on computer’s hard drive; court concluded defendant’s actions constituted “duplicating” images under subsection (A)(1) and were similar to other actions in that subsection that involved creation of visual image).

**13-3553(A)(2) Sexual exploitation of a minor—After visual image is created.**

.010 Subsection (A)(1) prohibits recording, filming, photographing, developing, or duplicating, while subsection(A)(2) prohibits distributing, transporting, exhibiting, receiving, selling, purchasing, electronically transmitting, possessing, or exchanging; because section (A)(1) is directed at the creation of the visual image, while section (A)(2) is directed at acts that can happen only after the visual image is created, these two sections address two separate harms and thus are two separate offenses.

*State v. Windsor*, 224 Ariz. 103, 227 P.3d 864, ¶¶ 11, 14 (Ct. App. 2010) (defendant accessed pornographic pictures of children on Internet, downloaded them, and saved them in shared file on computer's hard drive; court concluded defendant's actions constituted "duplicating" images under subsection (A)(1) and were similar to other actions in subsection (A)(1) that involved creation of visual image; court rejected defendant's contention that this interpretation of subsection (A)(1) would render superfluous terms in (A)(2), such as "electronically transmitting").

**13-3821 Persons required to register; procedure.**

*State v. Henry*, 224 Ariz. 164, 228 P.3d 900, ¶¶ 7-26 (Ct. App. 2010) (court follows *Smith v. Doe*, 538 U.S. 84 (2003) and *State v. Noble*, 171 Ariz. 171, 829 P.2d 1217 (1992), and holds registration requirement for sex offenders is regulatory in nature and thus does not violate prohibition against *ex post facto* laws).

**13-3821(C) Persons required to register; procedure—Chapter 14 or 35.1.**

.010 This subsection allows a trial court to order any person convicted of any offense under A.R.S. §§ 13-1401 to -1424 (sexual offenses) or A.R.S. §§ 13-3551 to -3561 (sexual exploitation of children) to register as a sex offender.

*State v. Davis*, 226 Ariz. 97, 244 P.3d 101, ¶¶ 21-23 (Ct. App. 2010) (because this section allows trial court to order sex offender registration for first offense, and because court assumed trial court was aware of law, court rejected defendant's contention that it ordered sex offender registration because it mistakenly thought this was defendant's third conviction).

**13-3825 Community notification.**

.010 Applying this statute to one convicted of a qualifying offense prior to the effective date of the statute does not violate the prohibition against *ex post facto* laws.

*State v. Henry*, 224 Ariz. 164, 228 P.3d 900, ¶¶ 7-26 (Ct. App. 2010) (court follows *Smith v. Doe*, 538 U.S. 84 (2003) and *State v. Noble*, 171 Ariz. 171, 829 P.2d 1217 (1992), and holds registration requirement for sex offenders is regulatory in nature and thus does not violate prohibition against *ex post facto* laws).

**13-3884(1) Arrest by a private person—Misdemeanor or felony committed in presence of person.**

.010 A private person may make an arrest for a misdemeanor amounting to a breach of the peace committed in the person's presence, and may make an arrest for a felony committed in the person's presence.

*State v. Garcia-Navarro*, 224 Ariz. 38, 226 P.3d 407, ¶¶ 11-14 (Ct. App. 2010) (border patrol agent saw defendant driving at high rate of speed while looking in rear-view mirror rather than watching road; defendant pulled onto highway and into fast lane, and was almost struck by another vehicle; court stated that, although defendant's driving may have violated traffic laws, it did not amount to breach of peace, thus statute did not give border patrol agent authority to stop defendant, so trial court properly granted defendant's motion to suppress).

**13-3922 Controverting grounds for issuance; procedure; restoration of property.**

.030 If a forfeiture proceeding is or has been initiated relating to the same property interest, this statute only precludes the magistrate from taking testimony in a proceeding to controvert the grounds upon which the search warrant was issued and to recover the property alleged to have been seized illegally, thus the magistrate may proceed and may decide the issues presented if able to do so without taking any testimony.

*In re Search Warrant No. 08 SW 1417*, 224 Ariz. 505, 233 P.3d 618, ¶¶ 8–13 (Ct. App. 2010) (on December 18, 2008, officers executed search warrant and seized property and on February 17, 2009, state initiated forfeiture action; while forfeiture action was pending, claimants filed action to controvert search and seizure; judge granted state’s motion to dismiss concluding A.R.S. § 13–3922(A) deprived him of jurisdiction because of state’s pending forfeiture action; court held statute only precluded judge from taking testimony, thus judge erred in dismissing proceeding to controvert search warrant).

**13–3925(A) Admissibility of evidence obtained as a result of unlawful search or seizure—Suppression of evidence.**

.010 Any evidence seized pursuant to a search warrant shall not be suppressed as a result of a violation of Title 13, Chapter 38 except as required by the United States Constitution and the Arizona Constitution.

*State v. Roberson*, 223 Ariz. 580, 225 P.3d 1156, ¶¶ 8–16 (Ct. App. 2010) (officers had search warrant that said nothing about unannounced entry; officer found defendant’s front door closed but unlocked; believing he had “no knock” warrant, officer opened door and went into home, where he seized drugs and drug paraphernalia; defendant conceded that, under United States Constitution, knock and announce violation does not require suppression of evidence seized; court noted Arizona cases have provided greater protection under Arizona Constitution only for warrantless searches, and that federal interpretation of knock and announce rule was consistent with interpretation of Arizona Constitution, thus even if there was violation of knock and announce rule, Arizona Constitution did not require suppression of the evidence seized; trial court therefore properly denied motion to suppress).

**13–4032(6) Appeal by state—Order granting a motion to suppress.**

.020 An order precluding the state from using certain evidence as a discovery sanction is not the same as the granting of a motion to suppress, thus the state is not permitted to appeal from an order precluding the state from using certain evidence as a discovery sanction.

*State v. Roper*, 225 Ariz. 273, 236 P.3d 1220, ¶¶ 5–8 (Ct. App. 2010) (trial court continued trial from 3/26 to 5/12; state moved to continue trial to 6/09 because DNA analysis would be complete on 5/26; trial court denied motion because it found state acted negligently in arranging for DNA analysis; state asked trial court to reconsider and set trial for 6/09, but trial court reiterated that state had acted negligently, and set trial for 5/26; state moved to dismiss charges and appealed trial court’s ruling; court noted effect of trial court’s ruling was to preclude state from using DNA evidence; court held order precluding use of evidence was not same as order granting motion to suppress, and concluded it did not have jurisdiction to consider state’s appeal).

**13–4033(B) Appeal by defendant—No appeal from guilty plea or admission of violation of probation.**

.070 If a defendant pleads guilty and is placed on probation, if the state files a petition to revoke probation and the defendant admits the violation, the defendant may not appeal from the subsequent judgment and sentence, but if the defendant contests the violation and the state proves the violation after a contested hearing, the defendant may appeal from the subsequent judgment and sentence.

*State v. Ponsart*, 224 Ariz. 518, 233 P.3d 631, ¶¶ 2–12 (Ct. App. 2010) (after contested violation hearing, trial court found defendant had violated probation and sentenced him to prison; court rejected state’s contention that defendant had no right to appeal and had to seek review only by petition for post-conviction relief).

**13–4033(C) Appeal by defendant—Absence at time of sentencing.**

.010 This section precludes a defendant from appealing if the defendant voluntarily absents himself or herself and that prevents the sentencing from occurring within 90 days after conviction; because the Arizona Constitution grants to a defendant the right to appellate review of a conviction, subsection (C) is unconstitutional unless it is shown the defendant knowingly and voluntarily waived the right to appeal by being absent.

*State v. Soto*, 225 Ariz. 532, 241 P.3d 896, ¶ 5 (2010) (because state conceded statute did not apply to defendant, court declined to rule on any constitutional or retroactivity issues).

**13–4051(A) Entry on record; stipulation; court order—Person wrongfully arrested, indicted, or otherwise charged.**

.010 This section allows a trial court to grant relief to any person wrongfully arrested, indicted, or otherwise charged; this is not limited to situations when law enforcement officers have engaged in unlawful or illegal conduct, but instead includes any situation characterized by unfairness or injustice.

*State v. Mohajerin*, 226 Ariz. 103, 244 P.3d 107, ¶¶ 9–27 (Ct. App. 2010) (defendant was charged with sexual assault and threatening or intimidating based on report his wife made that she had been battered and sexually assaulted by her husband; wife later recanted her allegations, and state dismissed charges; trial court denied petition because it concluded arrest was supported by probable cause and was neither unlawful nor illegal; court held trial court incorrectly believed its inquiry was limited to assessment of probable cause at time arrest was made, but noted it was required to affirm trial court’s ruling if legally correct for any reason; court concluded that, even though wife recanted her allegations, evidence indicated defendant had committed charged offenses, thus defendant failed to show unfairness or injustice).

**13–4066 Privileged communications; sex offender treatment; exception.**

.010 This section does not provide protection sufficiently broad to preserve a defendant’s Fifth Amendment privilege against self-incrimination, thus a defendant may assert privilege against self-incrimination for polygraph questions that may incriminate him.

*Jacobsen v. Lindberg*, 225 Ariz. 318, 238 P.3d 129, ¶¶ 6–13 (Ct. App. 2010) (defendant pled guilty in plea agreement that included sex offender conditions, including polygraph; court noted this could require defendant to make statements about uncharged crimes, and that immunity provided by A.R.S. § 13–4066 was not broad enough to preserve Fifth Amendment privilege against self-incrimination, and thus held defendant may assert privilege against self-incrimination for polygraph questions that may incriminate him).

**13-4437(A) Standing to invoke rights; recovery of damages—Victim’s standing.**

.010 The victim has standing to seek an order or to bring a special action mandating that the victim be afforded any of the victim’s rights or to challenge an order denying any of the victim’s rights.

*Morehart v. Barton*, 225 Ariz. 269, 236 P.3d 1216, ¶ 5 (Ct. App. 2010) (family members of murder victim had standing to bring special action to challenge trial court’s order granting defendant *ex parte* hearing to address defendant’s mitigation matters).

*State v. Nichols (Ergonis)*, 224 Ariz. 569, 233 P.3d 1148, ¶ 2 (Ct. App. 2010) (state’s special action was appropriate to present issue whether victim who is later charged with unrelated offense and taken into custody retains or loses status as “victim” under Victim’s Bill of Rights).

**15-507 Abuse of teacher or school employee in school.**

.010 This statute, which provides, “A person who knowingly abuses a teacher or other school employee on school grounds while the teacher or employee is engaged in the performance of his duties is guilty of a class 3 misdemeanor,” is over broad, but is constitutional if limited to fighting words.

x1 *In re Nickolas S.*, \_\_\_ Ariz. \_\_\_, 245 P.3d 446, ¶¶ 10–18 (2011) (court of appeals held statute was constitutional if limited to fighting words in cases involving pure speech, and juvenile did not argue that court of appeals erred in reaching that conclusion; Arizona Supreme Court assumed for purpose of appeal that statute was not fatally over broad or vague if narrowed to apply to fighting words).

**16-954(C) Clean elections tax reduction; return of excess monies.**

.010 This section provides “an additional surcharge of 10 percent shall be imposed on all civil and criminal fines and penalties collected pursuant to section 12-116.01,” which means the trial court must impose the surcharge on both the fines and the surcharges.

*State v. Rogers*, \_\_\_ Ariz. \_\_\_, \_\_\_ P.3d \_\_\_, ¶¶ 1–9 (Ct. App. 2010) (court held trial court should impose § 16-954(C) assessment against both underlying fine and surcharges imposed pursuant to § 12-116.01, thus correctly assessed \$457.50 surcharge under § 12-116.01 and \$97.50 surcharge under § 12-116.02, but should have assessed additional \$120.75, 10 percent of § 12-116.01 surcharge plus 10 percent of underlying \$750 fine, for total surcharge of \$675.75).

**22-375(A) Jurisdiction of Court of Appeals.**

.010 When a person is convicted in a court of limited jurisdiction and the superior court affirms the conviction, if the person appeals to the court of appeals, jurisdiction is limited to a review of the facial validity of the statute in question.

*State v. Putzi*, 223 Ariz. 578, 225 P.3d 1154, ¶ 2 (Ct. App. 2010) (court upheld constitutionality of Tucson City Code provision that prohibited person from urinating or defecating “in a public place, or in any place exposed to public view”).

.020 When a person is convicted in a court of limited jurisdiction and then obtains a trial *de novo* because either no transcript exists or the record is deemed insufficient and then appeals to the court of appeals, jurisdiction is limited to a review of a tax, impost, assessment, toll, municipal fine, or statute.

*State v. Eby*, 226 Ariz. 179, 244 P.3d 1177, ¶¶ 2–6 (Ct. App. 2011) (defendant was convicted of DUI in justice court, and then obtained trial *de novo* in superior court; court of appeals held its jurisdiction was limited as in any appeal from superior court of a case originating in court of limited jurisdiction, and rejected defendant's claim that he was entitled to full review of proceedings in superior court).

**28–751(1) Required position and method of turning—Right turns.**

.010 Because this statute has the requirement of “shall be made as close as practicable to the right-hand curb or edge of the roadway” for both “the approach for a right turn” and “a right turn,” it applies when a driver makes a right turn from a private driveway onto a roadway.

*State v. Bouck*, 225 Ariz. 527, 241 P.3d 524, ¶¶ 6–10 (Ct. App. 2010) (officer saw defendant make wide right turn from driveway onto middle lane of three-lane public street and stopped him, and subsequently arrested him for DUI; court rejected defendant's contention that statute did not apply when person turns from driveway onto public street).

**28–1323(C) Admissibility of breath test or other records—Manufacturers schematics and software.**

.030 The fact that the state does not have to produce the Intoxilyzer source code or a witness for the defendant to cross-examine about the source code does not violate the defendant's constitutional right to confront and cross-examine witnesses.

*State v. Linder*, \_\_\_ Ariz. \_\_\_, \_\_\_ P.3d \_\_\_, ¶¶ 4–9 (Ct. App. 2010) (court held maintenance records were not testimonial, and state would still have to produce witness who administered intoxilyzer test, and defendant could cross-examine that witness).

**28–1381(A)(1) Driving or actual physical control—Person under the influence of intoxicating liquor.**

.010 This statute prohibits a person from driving or actual physical control of a vehicle while under the influence if the person is impaired to the slightest degree; it does not require that the person's ability to drive a vehicle is impaired.

*State v. Miller (Oliveri)*, \_\_\_ Ariz. \_\_\_, 245 P.3d 454, ¶¶ 4–10 (Ct. App. 2011) (court held RAJI 28.1381(A)(1)–1, which includes language that “defendant's ability to drive a vehicle was impaired to the slightest degree” was incorrect statement of law).

**28–1383(A)(1) Aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs—suspended, restricted, or canceled driver's license.**

.020 This section applies to a person whose license or privilege to drive has been suspended, canceled, or revoked by the issuing states, whether that be Arizona or any other state.

*State v. Simmons*, 225 Ariz. 454, 240 P.3d 279, ¶¶ 2–12 (Ct. App. 2010) (defendant was charged with committing offense on 1/18/2008; Arizona had never issued a driver's license to defendant, but North Carolina and West Virginia had; court rejected defendant's contention that this section applies only to Arizona licenses; trial court found defendant's privilege to drive in North Carolina was revoked at time of offense, and defendant did not challenge that finding; defendant's West Virginia license was only license that had been issued to her; MVD representative testified that, at time of offense, defendant's W.Va. license was “expired” and not suspended, cancelled, or revoked, and that from 11/05/99 to 7/15/2005, defendant's driver's license was

in period of “mandatory revocation-conviction,” and although revocation was lifted, W.Va. never reissued defendant new license, and as result, on 1/18/2008, defendant’s W.Va. driver’s license remained expired; court held this was sufficient evidence to support conviction).

**28–3511 Removal and immobilization or impoundment of vehicle.**

.010 A peace officer shall cause the removal and either immobilization or impoundment of a vehicle if the peace officer determines that a person is driving the vehicle and the person’s driving privilege is suspended or revoked for any reason.

*State v. Organ*, 225 Ariz. 43, 234 P.3d 611, ¶ 22 (Ct. App. 2010) (after valid stop, officer determined defendant’s driver’s license had been suspended, and at that point, officer had to impound vehicle; while conducting inventory search, officer found crack pipe, cocaine, and methamphetamine; court concluded officer had lawful possession of vehicle because A.R.S. § 28–3511(A)(1) required him to impound vehicle once he discovered defendant’s driver’s license was suspended).

**36–3707(A) Determining sexually violent person’s status—Burden of proof.**

.030 The statute requires the state to prove beyond a reasonable doubt that the person meets the statutory definition of a sexually violent person at that time, thus a previous finding that the person does not meet the statutory definition of a sexually violent person does not preclude the state from proving that, at the current time, the person does meet the statutory definition of a sexually violent person, provided there is additional evidence to support that finding.

*In re Thomas R.*, 224 Ariz. 579, 233 P.3d 1158, ¶¶ 15–31 (Ct. App. 2010) (Thomas R. (TR) assaulted female in 1977 while in military and served 2 years imprisonment; 7/79, TR admitted to police he raped 67-year-old woman, but charges were dismissed as part of plea agreement; 7/79, TR raped 16-year-old girl, pled guilty to sexual assault, and was sentenced to 14 years in prison; in 1989, TR broke into vehicle and took two bags of clothing, pled guilty to burglary, and was sentenced to 6 years in prison; in 1995, TR sexually assaulted prostitute P., but charges were dismissed as part of plea agreement; in 1995, TR threatened to rape prostitute M., pled guilty to attempted sexual assault, and was sentenced to 9 years in prison; in 6/03, upon TR’s release from prison for conviction involving M., state filed SVP petition, but jurors found he was not SVP; in 2004, TR was charged with sexual assault of prostitute B., but indictment was dismissed because B. moved out of state and state was unable to serve subpoena on her to compel her to testify against him; TR admitted violating probation in 2005, 2006, and 2008, and in 2008, trial court revoked probation and sentenced him to prison; prior to his release, state filed new SVP petition, and jurors found TR was SVP; court rejected his res judicata and collateral estoppel arguments; court held TR’s past actions, together with evidence of his actions after jurors’ finding in 2003, supported finding that TR was SVP).